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NAZI CHANGES IN CRIMINAL PROCEDURE

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Description

This paper describes the system of German criminal procedure in existence before 1933 and the changes wrought in it under the Nazi regime.

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Numbers quoted without further specification refer to the code of criminal procedure as of 1932.

G.V.G. ..... Act on jurisdiction and organization of courts (Gerichtsverfassungsgesetz)

G.V.G.n.v. ..... Act on jurisdiction and organization of courts as changed by the Nazis (Gerichtsverfassungsgesetz)

J.G.G. ..... Pre-Nazi law on criminal administration of cases of juvenile offenders (Jugendgerichtsgesetz)

RGBl. ..... Reichsgesetzblatt

St.P.O.n.v. ..... Code of criminal procedure as changed by the Nazis (Strafprozessordnung)

There are four widely used commentaries on St.P.O., all of which include comments on G.V.G. and J.G.G.:

1. Strafrecht und Strafverfahren by A. Dalcke (30th ed. by Fuhrmann-Krug-Schaefer, Schweizer, Berlin and Munich, 1938). (This commentary includes all relevant procedural and substantive criminal laws, but does not contain theoretical discussions; it refers to the most important cases and practices observed by the courts, without critical comment. Widely used by lower courts).

2. St.P.O., by Loewe-Hellwig-Rosenberg (19th ed. by Guendel-Hartung-Lingemann-Niethammer, de Gruyter, Berlin and Leipzig, 1934). (This commentary is most exhaustive and thorough. Prepared by members of the Supreme Court, it quotes and follows up not only published decisions but also unpublished decisions of the criminal division of the Supreme Court).

3. St.P.O. by Eduard Kohlrausch, (de Gruyter, Berlin, 1938). (This small commentary was prepared by a professor of criminal law at the University of Berlin. Widely used in the universities, it is characterized by its short, incisive comments rather than by its orthodoxy).

4. St.P.O. by Otto Schwarz (5th ed., Beck, Munich, 1938). (This commentary was prepared by a member of the criminal division of the Supreme Court, is imbued with Nazi thinking, and is inclined to sponsor Nazi interpretations).

These commentaries are available in Washington and will probably be found in libraries in Europe having collections of German law.

I. INTRODUCTION

A. Statement of the Problem

Like the procedure of neighboring countries, criminal procedure in Germany, as practiced under the Weimar Republic, was the child of the liberal age. It insisted upon the rights of the defendant, stressed publicity of hearings, and, above all, upheld a very liberal system of appeals. At the same time, however, it was the emanation of a society from which a certain amount of bureaucratic authoritarianism was never absent. As in France, the German procedure gave wide recognition to the proceedings in camera of the juge d'instruction and, in particular, supported the preeminence which the presiding judge traditionally takes in the conduct of continental trials.

Whether the liberal guarantees or the bureaucratic authoritarianism was in the ascendancy varied at different periods and places. The frequent absence of counsel for the defense, the prevailing political climate, the educational and social background of the judges, and - after 1924 - the absence of a genuine jury trial may well have outweighed the liberal system of guarantees found in the written sources of German criminal procedure.

After the rise of the Nazis, certainly, the authoritarian nature of the procedure was increasingly stressed and carried to such a point that, by the end of the war, German criminal procedure had assumed the character of non-contradictory administrative proceedings. The methods by which the Nazi regime accomplished this transformation included:

1. introduction of radical changes in substantive criminal law;

2. introduction of radical changes in criminal procedure;

3. Nazification of both bench and bar; and

4. creation of special courts and agencies to handle criminal problems.

It is proposed in this paper to discuss and describe only the changes which the Nazis have wrought in German criminal procedure, as the other methods of transformation have been thoroughly canvassed in other papers.[1] Further, this paper is designed, in its analysis of the Nazi changes in criminal procedure, to do no more than enumerate (a) the main features of the system which was in operation when the Nazis came into power and (b) the chief changes made by the Nazis. Finally, this paper will not deal expansively with the Nazi changes in procedure as to juvenile offenders,[2] Nazi codification of military penal procedure, Nazi procedure in enforcement of price regulations, or Nazi changes in the criminal procedure of occupied territory.

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1. The main features of the other techniques are described in Civil Affairs Handbook, Germany: Section 3: Legal Affairs (Army Service Forces Manual M. 356-3) and Civil Affairs Guide, Administration of German Criminal Justice under Military Government (War Dept. Pamphlet No. 31-108). The implementation of this planning can be found in Handbook on Military Government in Germany prior to Defeat or Surrender, Pars. 82-85 and 520 et seq.

2. Act of 16 Feb. 1923 (Jugendgerichtsgesetz), RGBl. I. 135 and its revision of 10 November 1943, RGBl. I. 637.

II. THE PRE-NAZI SYSTEM OF CRIMINAL PROCEDURE

The pivotal regulations for purposes of German criminal procedure are contained in the rules of criminal procedure, originally enacted 1 February 1877 and revised 22 March 1924,[1] and the regulations on the jurisdiction and organization of the courts, originally issued 27 January 1877 and revised 22 March 1924.[2]

A. Organization and Jurisdiction of the Criminal Courts

Before 1923, original criminal jurisdiction, except for those few cases reserved for the Schwurgericht (assizes), was still in the Amtsgericht (local courts). This local jurisdiction was exercised either by a single judge (24, 25 G.V.G.), by the small Schoeffengericht which consisted of one judge and two lay assessors (Schoeffen), or by the enlarged Schoeffengericht, which consisted of two judges and two lay assessors. A single judge heard cases involving petty offenses (Uebertretungen), lesser misdemeanors, and certain felonies; these last consisted mainly of cases of second offenders (25, 26 G.V.G.). Other misdemeanors and most felonies were tried by the Schoeffengericht. Decision as to whether the case should be heard by the small or enlarged Schoeffengericht was made by the state attorney.

This system was in operation until 1932, when, for reasons of economy and expeditious procedure, the enlarged Schoeffengericht was suppressed[3]

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1. Act of 22 March 1924 (Strafprozessordnung), RGBl. 1.322.
2. Act of 22 March 1924 (Gerichtsverfassungsgesetz), RGBl. 1.299.
3. Emergency decree of 14 June 1932, RGBl. 1.285. Some jurisdictional shifts had already taken place, under the emergency decree of 6 October 1931, RGBl. 1.537.

and its functions transferred to the criminal section of the Landgericht (district court).

Original jurisdiction in a specified number of major felonies, such as murder, arson, and wilful perjury, had long been vested in the Schwurgericht, which assembled periodically at the seat of the district court (79, 80 G.V.G.). Before 1924, the Schwurgericht consisted of three judges and twelve jurors, the jury deciding on issues of guilt on the basis of a questionnaire prepared by the judges. An emergency decree in effect did away with this court in 1924.[1] Although the name Schwurgericht was retained, the court was then transformed into a somewhat enlarged Schoeffengericht. Three judges and six lay assessors deliberated and decided jointly on questions of guilt and punishment (81, 82 G.V.G.). This reform, by making the professional judge an absolutely dominant figure, substantially weakened any popular influence in criminal administration.

Appellate jurisdiction was vested primarily in the Landgericht (district court) and the Oberlandesgericht. The Landgericht had a dual function in appeals. Its small criminal section, consisting of one judge and two lay assessors, heard appeals from the judgment of a single judge in the Amtsgericht (local court) (74 G.V.G.), while the enlarged section, consisting of three judges and two lay assessors, heard appeals from the Schoeffengericht (76 G.V.G.). The lay assessors took part only in the trial proceedings. Other decisions, including pre-trial decisions, were

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1. Emergency decree of 4 January 1924, RGBl. 1.15.

made by the three professional judges acting alone (76 G.V.G.). The Oberlandesgericht (appeal court) had mainly appellate jurisdiction. Its criminal division sat with five members and reviewed questions of law in cases originating with the single judge of the Amtsgericht (local court) or with the small Schoeffengericht (121, 122 G.V.G.).

The Reichsgericht (Supreme Court) had both original and appellate jurisdiction in criminal cases. The five-man criminal section of this court had jurisdiction in treason cases, subject to the right of the Oberreichsanwalt (chief Reich attorney) to move for the transfer to the appeal court of lesser treason cases (134 G.V.G.). It gave final review to legal problems involved in cases originating in the enlarged Schoeffengericht, in the criminal section of the district court after 1932, and in the Schwurgericht (135 G.V.G.).

B. The Organization of the State Attorney's Office

The Ministry of Justice was at all times the hierarchial superior of all prosecuting attorneys (146 G.V.G.).

The Oberreichsanwalt (chief Reich attorney) was the chief of the prosecuting staff of the Reichsgericht.

The Generalstaatsanwalt (Attorney General) was attached to the appeal court. He acted as head of the prosecuting staff of his own court, and supervised and issued orders to the head of the prosecuting staff of the Landgericht (district court), who was called Oberstaatsanwalt. The latter's staff took care of the prosecution of cases before the local courts. The decision of whether a case should be heard by the small or enlarged

Schoeffengericht was made at this level (28, 29 G.V.G.). In minor cases, the prosecution before a single judge of a local court might be presented by a Referendar (law clerk) or by a specially picked official from the clerical staff (Amtsanwalt) (142 G.V.G.).

These officials were always appointed, never elected. They were kept in line with the official policies of their hierarchial superiors by rewards in the form of more or less rapid promotions. Another device was the special reports which they were required to submit for purposes of information, either regularly or in specially important cases. However, direct pressure on the state attorney was the exception rather than the rule under the Weimar Republic.

C. The Pre-Trial Proceedings

1. The Initiation of Criminal Proceedings Like its American counterpart, German criminal procedure rested on the principle that a criminal court acts only when a case is brought before it by way of accusation (151).[1] Thus, the law of this period imposed on the state attorney, who was considered defender of the public interest, the duty of investigating all circumstances of each case -- those favorable to the defendant as well as those unfavorable to him -- in order to decide whether certain acts should or should not be prosecuted and what punishment should be sought in case of conviction (160).

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1. The more familiar terms "indictment" and "information" are not used, as the German law does not know the difference between indictment (true bill) found by a grand jury and an information formulated by the district attorney alone. In Germany, all acts of accusation are drawn up by the state attorney alone.

An offense could be brought to the attention of the state attorney either through the complaint of a private person or through the police, who were, at least under the Republic, no more than an auxiliary investigating service for him (161 St.P.O., 152 G.V.G.).

The state attorney had, however, complete direction of all prosecutions (152). His discretion in instituting prosecution was limited before 1924, because, if he found that the defendant had committed an offense, he was obligated to prosecute (Legalitaetsprinzip, which is described in 152). In 1924, he was given certain discretion as to the institution of prosecutions. Even though he found that an offense had been committed, he was authorized to refrain from prosecution, if it were petty and if he considered its effects on the public inconsequential. If prosecution had been begun, he might enter a nolle prosequi under similar circumstances, provided that the judge of the Amtsgericht (local court) consented (Opportunitaetsprinzip, described in 153). In a few instances, such as prosecutions of adultery, defamation, and simple assault, the criminal code made any prosecution dependent upon the request of the injured person (158).

Preliminary investigation was informal. No notification to the suspected person was required. The state attorney could hear witnesses, if they chose to come voluntarily to his office. He could inspect the scene of the offense, and take other action of a like nature. As in the United States, most of this preparatory work was in fact performed by the police under the state attorney's direction. If such informal action was found insufficient -- if the state attorney wished to have an oath administered,

or a subpoena issued -- he was obliged to apply to the judge of the Amtsgericht (local court), within whose jurisdiction the act in question was to be performed (162).

At the end of such preliminary investigation, three courses of action were open to the state attorney, the first two of which were forms of public complaint and brought about judicial action:

1. If he considered the evidence amassed sufficient, he could file the act of accusation;

2. If the case was complicated and seemed to require further investigation, or if the law made such proceedings mandatory, he applied for a formal judicial investigation;

3. If he considered the prosecution without chance of success, he formally entered the case in the administrative files and no public complaint was made (Einstellungsbeschluss).

If the investigation had been started on the complaint of a private individual, if the complainant had suffered injury, and if the state attorney's superior had sustained his decision not to prosecute, the complainant could appeal to the court. After an investigation of its own, the court might overrule the state attorney's decision and order him to file a public complaint. More frequently, it merely upheld his decision. The court's decision was final (172-177).

2. Arrests, Search and Seizure A prosecuted person could be taken into custody at any stage of the proceedings. Arrests required a written warrant which could be issued only by a judge having jurisdiction of the case (114-124). Ordinarily, the judge either of the court of venue or of the Amtsgericht where the suspect was found would act on motion by the state attorney. In urgent cases he could, however, issue warrants on his own.

The warrant stated the offense and person charged. Its issuance did not presuppose the existence of a sworn complaint. A warrant could be issued after an ex officio check by the court, if it were shown that the person named in the complaint was seriously suspected of having committed a specified offense and was likely to try to escape, or to remove or conceal evidence. A legal presumption of an intention to escape was raised in case the offense in question was a felony, or in case the person alleged to have committed the offense was a vagrant, a homeless person, or a foreigner, who could be expected not to heed a summons (112). On the other hand, the rules governing arrest were stricter if the offense was punishable only by detention or fine (113).

A warrant issued by a German court could be executed anywhere in Germany. In case of a person in flight or hiding, a warrant of apprehension (Steckbrief) might be issued by the judge on the basis of the original warrant.

The state attorney or the police could arrest without a warrant if the conditions for its issuance existed and if delay would endanger prosecution. A private citizen might, but was not required to, detain an individual caught while committing an offense. Such private action was not challenged if the offender was suspected of attempting to escape or if his identify could not be immediately established (127). No restrictions existed as to the time and place of such arrests, but, at the latest on the day following the arrest, the suspect had to be brought before the local judge. Within twenty-four hours the judge had either to issue a warrant or release the suspect (128).

In the same manner, a person arrested under judicial warrant had to be brought before the judge on the day following his arrest for hearing (115). In practice this merely served to confirm the arrest.

In addition, the defendant could challenge the validity of the warrant, as well as its necessity, by means of a complaint filed in the criminal section of the Landgericht (district court) (304). As this device did not prove sufficient to check abuses, and as it often unjustifiably prolonged periods of detention, the code of criminal procedure was amended in 1926.[1] The amendment gave the person detained the right to ask at any time for a hearing, to be held within a week, before the criminal section of the Landgericht (district court) for the purpose of summary re-examination of the conditions of commitment (114 d). Further, such a hearing was mandatory after two months' detention and had to be repeated at intervals of no less than three weeks and not more than three months (115 a-d).

Release on bail, though admissible at the court's discretion, was used rather sparingly (117-122). Persons held for investigation and waiting trial were kept separated from persons who had been sentenced. They could not be forced to work and might be subjected only to restrictions necessary for the purpose of detention and the maintenance of order (116). In addition, a practice, which was sanctioned by the criminal code, prevailed in German courts of including all or part of the detention period in the computation of the term which the prisoner was to serve (60 Penal Code).

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1. Statute of 27 December 1926, RGBl. 1.529.

If the proceedings were later dropped for lack of reasonable suspicion, or if the defendant was acquitted, indemnity for the pecuniary damage suffered through the unjustified detention was provided by special statute.[1]

Objects which had evidential value or which might be the subject of confiscation could be seized. Ordinarily, search and seizure required a warrant; but, in those cases in which delay would involve risk, the state attorney was authorized to act (98, 105). However, if the possessor of the article was not present or if members of his family protested, judicial authorization had to be sought within three days (98). Searches at night were allowed only in carefully defined cases (104). The owner or his representative was entitled to be present during the search, the purpose of which had to be disclosed at the outset. A certificate stating the fact of search, its purpose, and a list of the objects seized had to be given if demanded (106-107). "Fishing expeditions" for securing evidence were allowed, but not in regard to non-suspected third persons (102-103). Only the judge could read papers which had been seized, if the owner did not consent to reading by other officials (110).

Some special rules existed for the seizure of mail. The person affected had to be notified. Seizures without warrant had to be confirmed within three days by the judge, who alone was authorized to open and read the seized mail (99-101).

3. Preliminary Judicial Investigation The preliminary judicial investigation (Voruntersuchung) was mandatory in all jury trials and in

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1. Statute of 14 July 1904, RGBl. 321. This statutory procedure was rarely invoked.

cases arising under the original jurisdiction of both the appellate and Supreme Court. In other felony and misdemeanor cases it would be requested by the state attorney or the defendant. It was usually used in the more complicated cases, which required the hearing of many witnesses and detailed examination of account (178).

In effect it made for delays and subjected the defendant to inquisitorial methods, but usually gave both the prosecution and the defense a better opportunity to prepare the case and to concentrate on the essentials.

The examining judge (Untersuchungsrichter) was a member of the Landgericht (district court). He was appointed to act as an examining judge. The term of office for this function was the fiscal year (61 G.V.G.). He was disqualified from subsequent participation in the trial of a case, which he had examined (32), although he might be heard as a witness by the trial court. It was his duty to investigate the case, so as to give the prosecution a basis for drawing up the accusation or for discontinuing the case (190). He examined the defendant in the absence of state attorney and counsel (192). He visited localities, and heard and confronted witnesses and experts informally or, in some cases, under oath. He had, however, no power to drop the case. When he had completed his duties, he returned the file to the state attorney. He made no findings.

The state attorney formulated his conclusions and submitted them to the criminal section of the Landgericht (district court) (198). It was then up to that court to decide whether a trial should or should not take place. The state attorney was permitted to appeal from a decision against trial (210).

He could reopen the case after such an adverse decision only if he had secured new evidence (211).

4. The Order to Hold Defendant for Trial (Eroeffnungsbeschluss)

While the state attorney might discontinue prosecution on his own initiative, except when a preliminary judicial investigation had taken place, a special court order was necessary to open trial. This court order approximated to some extent the "true bill" of the American grand jury and was issued by the court of venue -- or, if a preliminary judicial investigation had taken place, by the criminal section of the Landgericht (district court) -- on the basis of the accusation submitted by the state attorney. The order was issued if the court found the accused[1] "sufficiently suspect" of the offense charged. It described the criminal act in terms of the specific facts required by the legal definition of the offense in question (203). The accused had to be presented with a copy of this order as soon as he was summoned for trial (215). The order to hold for trial was final (210).

This procedure was not applied in all prosecutions because of its complicated, and often dilatory, nature. In cases within the jurisdiction of the Amtsgericht (local courts), a more informal prosecution was permitted when petty offenses were concerned, if the defendant agreed when he was brought before the court immediately after provisional arrest by the police. In such cases, neither written accusation nor formal court order to hold for trial was required (212). The courts in urban areas were, furthermore,

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1. The defendant is termed Beschuldigter up to the time a public complaint is sent to the court by the state attorney. He is then called Angeschuldigter. After a judicial order holding him for trial has been issued, he is called Angeklagter. The shading of meaning in these three terms is impossible to translate.

in continuous session to act immediately after arrest upon cases involving drunks, prostitutes, traffic violators, pickpockets, etc.

5. Counsel for Defense The defendant was entitled to services of counsel at every stage of criminal procedure (137). In a number of cases -- among them all jury trials and trials before the appeals court and the Supreme Court -- the presence of defense counsel was mandatory, so that the court had to appoint counsel for the indigent defendant. Otherwise, if the case was complicated, the court might appoint counsel from the ranks of the bar or from law clerks serving the court (178 et seq.). Lawyers appointed by the court received a small fee, which was fixed by law (150). Otherwise, the question of compensation was a matter for private arrangement between defendant and counsel. In the majority of criminal cases, however, the accused used to appear without counsel, being unable to meet even these fees.

Counsel for the defendant could intervene at any stage of the proceedings. He had a legal right to inspect the file of the case only after the act of accusation had been sent to the court or after the preliminary judicial investigation had been closed (147). He was not given access to the files of the state attorney.

Contempt of court proceedings against lawyers were unknown to this period of German law. It should, however, be pointed out that the German bar at this time was not distinguished by a spirit of fiery independence. It rarely challenged the supremacy of the president of the court and, with some few individual exceptions, was satisfied with a rather secondary role in criminal proceedings.

D. The Trial

1. Principles Governing Trial The German criminal trial (Hauptverhandlung) of this period was governed by a series of definite requirements. Trial had to be public, oral, immediate, and concentrated.

Trial was public. Thus, the court room was open to adults. The press had access and could make public accurate reports (169, 175 G.V.G.). A court order was necessary in order to exclude the public, whether for reasons of public safety or the protection of public morality. The judgment itself had, however, to be read in public, even if the order excluding the public was extended to the reading of the reasons on which it was based (172-175 G.V.G.).

The requirement that the trial be oral and immediate entailed the result that everything used as the basis of the judgment had to be produced through the medium of the spoken word. In fact, the use of written evidence was permitted only in a number of precisely defined situations. Documents, such as records of previous convictions and extracts from original registrations, had to be read aloud (249). Minutes of a prior judicial interrogation of a witness, now dead or unavailable, could be read (251).

It was further required that the persons rendering judgment should be present throughout the trial. Thus, a number of substitute judges and lay assessors might be requested to sit in on protracted trials (192 G.V.G.).

The principle of concentration required that the trial proceed without prolonged interruption. Therefore, an adjournment for more than three days automatically ended the trial--without prejudice, however, to the possibility of trial de novo.

2. Position of the Presiding Judge By tradition and law, a criminal trial of this period was controlled by the president of the court. Although rulings were made by the court, it was the presiding judge who conducted the trial and determined the sequence of proceedings. He examined the accused, the witnesses, and the experts. While the code allowed the other judges and lay assessors, as well as the state attorney, counsel for defense, and even the defendant, to ask direct questions (246), the initiative remained entirely with the president. He might reformulate the questions, withdraw the right to ask questions ruled unsuitable and inappropriate, or provoke a court order to that effect (241, 242). Cross-examination of witnesses was permissible on joint demand of prosecution and defense (239). But this was done infrequently. The effect of such examination was often obliterated by the fact that the presiding judge started questioning on his own after the parties had concluded their cross-examination.

3. The Course of Trial The trial, the date for which was fixed by the presiding judge (213), started with the roll call of all persons whose attendance was required. Witnesses and experts were briefed as to their duties and then excluded from the court until their presence was actually required, in order to prevent bias and collusion (59, 243).

The accused was then questioned by the president as to his identity and antecedents. Ordinarily no trial could be held in his absence. There were, however, some exceptions to this rule. If the accused absented himself after the termination of his own examination, the trial might proceed, unless the court ruled his presence necessary (231). In certain minor cases involving fines or detention, trial might proceed even if the defendant were absent, subject to his right to ask for new trial within one week after

judgment had been served (232). In cases involving fines and articles subject to confiscation, a trial date could be set for a person whose whereabouts were unknown (277). Finally, any trial could proceed temporarily in the absence of the defendant, if he had been barred from the court room because of disorderly conduct (177 G.V.G.) or if it was held likely that a co-defendant or witness might withhold the truth in his presence. However, in these cases, after the defendant returned to the court room, the presiding judge was required to reveal to him the main results of the discussion which had taken place in his absence.

A representative of the state attorney's office had to be present during the whole trial.

After these preliminaries had been concluded, the order to hold the defendant for trial was read (243). From this time on, the trial proper began, and the defendant could no longer raise a number of preliminary objections, such as failure to allow for a proper period for preparation (217), challenge of a judge for bias, etc. (225).

The presiding judge then began the examination of the accused on the charge. There was no plea of guilty or not guilty. An admission of guilt might be made at any stage of the proceedings, either in court or out of court. It was treated merely as evidence to be evaluated by the court. The accused was merely asked to tell his story as a whole. However, during the process, the presiding judge and, to a lesser degree, the other trial participants, might interject questions or contradict the accused. Often the presiding judge, who had before him the file accumulated during the pretrial stage, confronted the defendant with his earlier statements. On the other hand, the defendant did not testify under oath; nor could he be compelled

to make any statements at all, although it was good practice in German courts to hold against him his refusal to take the stand.[1]

After hearing the defendant, the court began hearing the evidence (244). Paragraph 261 enunciated the principle of free evaluation of evidence. No statutory rule existed restricting the nature of questions properly put to witnesses and experts. Hearsay evidence was not excluded. However, as a kind of compensation, the court had a duty, in principle, to hear all evidence offered by either side (245). With the exception of cases concerning petty offenses and private prosecutions, it had a duty to examine all witnesses, experts, and other evidence summoned or produced by the parties, unless produced maliciously or in order to cause delay (245). But as the court was considered under a duty to ferret out the truth, not to direct the trial as an arbiter between contending parties, it could, and often did, order the appearance of witnesses who had not been summoned by either the defense or the prosecution.

A witness or expert summoned by subpoena, which was valid throughout the Reich, had to testify as a matter of public duty. Unexcused failure to heed a subpoena or to testify under oath was punishable by fine or, in the case of witnesses, detention for a period up to six months (78, 84).

A certain number of witnesses were entitled to refuse to testify for family or professional reasons (52-53), for reasons approximating those recognized in the United States. Public officials had to have the permission of their superiors in order to testify as to knowledge acquired in the course of their official duty (54). The frequent invocation of this

1. See Hoechstrichterliche Rechtsprechung 1929, 2058 and Juristische Woehenschrift 1930, 713 and 1525.

privilege often effectively blocked the discovery of illegal activities of German authorities, particularly in the field of rearmament. Finally German criminal procedure recognized an absolute privilege to refuse to testify, if the person involved had reason to feel that the testimony would incriminate him.

Witnesses were examined in the same manner. They were informed of the extent of their privilege to refuse to testify. However, before questioned, the witness was sworn (62). He then testified as to facts and was not supposed to express opinions. Ordinarily he gave his testimony orally and in open court (250). Records of earlier testimony could not be substituted for this questioning in open court, if the witness was available (251). The court might, however, read him the record of such testimony to refresh his memory (253).

Experts might be summoned by the parties, but were more often appointed ex officio by the court from an official roster (33). They were likewise subject to oral examination.

The trial concluded with the arguments of the parties. They were presented, first, by the state attorney, then by counsel for the defense, and finally by the defendant (258). This sequence could not be changed.

Minutes of the whole trial were taken by a recorder or law clerk, who was present throughout the trial. They were signed by the presiding judge and the recorder (271). However, as German criminal procedure lacked the basis of formal rules of evidence, the purpose of the record was not to give a detailed stenographic record of the proceedings, which might be impugned by either party; its purpose was rather to present unimpeachable proof (except

in the case of deliberate falsification) of the observance of the required formalities (272-274).

E. Position of a Private Party

There were two methods recognized by German criminal procedure by which a private person could become a party to criminal litigation.

First, in a number of instances which were specifically defined -- such as simple assault and defamation -- and which were considered to involve no public interest, the person who had suffered the injury was authorized to institute criminal proceedings against the offender as a private prosecutor (374). These private proceedings were subject to special requirements. The filing of the prosecution had to be preceded by an attempt at conciliation by a semi-official arbiter (Schiedsmann). The private prosecutor could withdraw his complaint up to the moment of judgment. The defendant was permitted to file counter claim, if the prosecutor had been guilty of similar offenses (as by mutual insults, etc.). Because such private prosecutions were a favorite pastime in Germany, an emergency decree of 6 October 1931[1] authorized the judge summarily to dismiss prosecution of unimportant offenses. This reduced the number of this type of case to some extent.

Second, in certain cases the injured person was permitted to join a pending criminal action instituted by the state by means of a written declaration of joinder (295). Such persons were those who had been authorized by statute to initiate private prosecutions; those who had suffered injury to health, life, liberty, status, pecuniary interests, etc., as long as they had obtained a court order to open proceedings over the objection of the

1. RGBl. 1.537 (Part VI, Ch. I, para. 7).

state attorney (172); and those who under substantive criminal rules could claim payment of a penalty (Busse) to them.

The person who thus joined the prosecution acquired the status of a private prosecutor (297). He could file independent appeals, but otherwise the control over proceedings was still concentrated in the hands of the state attorney.

F. The Judgment

1. Formulation Professional and lay judges deliberated together, secretly on the judgment to be rendered. Issues concerning guilt, and the length and mode of punishment, required decision by a two-thirds majority (263); other decisions, including intermediary rulings, required a simple majority (196 G.V.G.).

The judgment was usually read at the close of trial, although one week's adjournment for its preparation was permissible (268). It was read publicly by the presiding judge (173 G.V.G.). An oral summary of reasons was then given. It contained a ruling on the liability for costs (464).

No dissenting opinion could be expressed by a member of the court.

The text of the judgment, as formulated by the judges, formed part of the official trial record (268). Within a week, the court was required to state the reasons for the judgment in writing. This opinion was prepared by one of the professional judges, who was assigned to the task by the presiding judge, and was signed by all the professional members of the trial court (275). It contained a statement of the relevant facts, a discussion of the proof, a description of the act of the defendant in terms of the applicable law and, in case of conviction, usually some more or less stereotyped formulae justifying sentence (267).

2. Types of Judgment Three possible judgments might terminate a trial (26a). Conviction also included the sentence. Suspension of the sentence might take place under another court order. Acquittal occurred, however, when guilt had not been proved, or when the acts proved did not fall within the terms of a penal sanction. It was, however, possible, when several offenses had been charged, that the defendant might be acquitted of some and convicted on other counts. Dismissal took place, when judgment was barred, through operation of the Statute of Limitations, the rule on double jeopardy, lack of necessary formal complaint by the injured party, etc.

3. Effect of Judgment

a. Double Jeopardy Rule The prevailing opinion in Anglo-American practice restricts the operation of the double jeopardy rule to the prohibition of a new prosecution for the same offense. German law and practice of this period barred a second prosecution not only for the same offense, but also for the set of facts which had been the object of examination by the first court. However, this enlarged protection for the accused was balanced by the greater liberty given to the German trial court to change the theory under which the accusation had been brought, without having to fear attack under a charge of variance. A German trial court adjudicated on the facts alleged in the accusation drawn by the prosecution. It was not bound by the legal theory invoked by the prosecution (264). If during the trial the act of the accused appeared in a new light (e.g., embezzlement or receiving instead of larceny), the court would take the new circumstances into consideration in passing judgment.

If, however, the court took such action, it was required to (1) inform the defendant of the new situation which might involve the possibility of applying a hiterto unmentioned statute or provision and give the defendant an opportunity to prepare his defense in the light of the new circumstances (265); (2) refuse to assume jurisdiction if the case appeared to belong to another court (270); and (3) unless the accused consented (266), refuse to take jurisdiction over new and additional criminal acts which were not contained in the original accusation.

b. Finality The judgment became final when it was no longer subject to attack by the ordinary remedies of appeal. Retrial (Wiederaufnahme des Verfahrens) was permitted only in rare instances. It could take place on motion either by the prosecution or by the defense if the judgment had been based on a forged document, on perjured testimony, or on corruption of members of the trial court. A retrial which might benefit the defendant could be secured if the judgment had been based on a civil judgment subsequently reversed by a final judgment, or if new facts had been discovered which would have called for the acquittal of the accused or for the application of a statute providing for a more lenient punishment. A retrial which might result in disadvantage to the accused was possible if the defendant had made a creditable confession of guilt in or out of court (359, 362). Nothing in the nature of the Statute of Limitations ran against applications for retrial.

c. Execution Final sentences were executed on orders issued by the state attorney. However, in cases decided by a single judge of the Amtsgericht (local court), the execution of the sentence was, in most German states, subject to order of that judge (451).

d. Clemency Individual acts of clemency which represented an exercise of the sovereign power of the state, were considered to belong to the sphere of political action and, consequently, were left to the various state governments in all cases not belonging to the original jurisdiction of the Reichsgericht (Supreme Court). In Prussia, for example, the Ministry of Justice appointed a commissioner for this purpose (Beauftragter fuer Gnadensachen) from among the members of the Landgericht (district courts).[1] This commissioner examined the petitions for clemency and reported to the Ministry, after having inquired into the views of the trial court and the state attorney. A number of such decisions on petitions for clemency were transferred to him en bloc. Sentences not exceeding six months could be suspended by the trial court on good behavior.[2]

C. Special Proceedings

1. Penal Orders On request of the state attorney, and without trial, a single judge of the Amtsgericht (local court) might issue a written penal order (Strafbefehl) imposing a fine or imprisonment of not more than three months (407). In a number of petty offenses, penal orders providing for fines or detention up to two weeks could be issued by the police (413). In both instances, the person against whom such orders had been issued could file objections within a week, which forced a trial governed by the ordinary rules of procedure. If no such objection was taken, the order stood as a final judgment (410, 411).

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1. Prussian decree of 19 June 1919, Justizministerialblatt, p. 341.

2. Prussian circular of 19 October 1920, Justizministerialblatt, p. 565.

2. Proceedings in Juvenile Courts Since 1923, Germany has had a special statute on the criminal administration of cases involving juvenile offenders.[1] All persons under 18 years of age came within the jurisdiction of these juvenile courts. Those between 18 and 21 could be brought before these courts if the state attorney so elected in his act of accusation.

Juvenile courts sat with one professional judge and two lay assessors (Jugendschoeffen). In cases which would ordinarily come before the jury, the juvenile court sat with two judges and three lay assessors (J.G.G. 17). On appeal cases were, if possible, brought before the special criminal sections of the Landgericht (district court) (J.G.G. 19).

Both the trial and the reading of the judgment were closed to the public (J.G.G. 23). Both the public authorities dealing with juvenile problems and the family court were kept informed of the proceedings. Close collaboration with a special juvenile service organization (Jugendgerichtshilfe) attached to the local juvenile authorities (Jugendamt) was required at all stages of the proceedings (J.G.G. 22). This juvenile service organization had been built up in the twenties and was designed to inquire into the social and personal circumstances which led to the offense (J.G.G. 31). Detention pending trial was avoided as far as possible (J.G.G. 28).

H. Criminal Appeals

There were three ways in which the decisions of the trial court were reviewed: complaint (Beschwerde), which secured review of incidental points

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1. Statute on juvenile courts (Jugendgerichtsgesetz) of 16 Feb. 1923, RGBl. 1.135.

and was mainly used for procedural issues; appeal (Berufung), which secured review of the facts and the law, and also the sentence; revision, which was restricted to review of questions of law.

1. Complaint Review of incidental decisions existed in the form of either simple complaint or immediate complaint. While simple complaint did not have to be filed within any particular time limit, immediate complaint had to be filed within a week after entry of judgment. Complaint had no suspensive effect on the decision under attack. As a rule, it was disposed of informally and without any hearing (304-311).

2. Common Rules for Appeal and Revision Both appeal (Berufung) and revision led to a review of the judgment, whatever its nature. All judgments were subject to attack both by the prosecution and by the defense. German procedure thus allowed the state to seek reversal of a judgment of acquittal.

Both appeal (Berufung) and revision had to be filed within a week after judgment was rendered. The judge presiding over the first trial was under a duty to advise the accused of his right to secure review. If the defendant waived his right to review, the judgment became final and sentence started to run immediately (302). The filing of either appeal (Berufung) or revision suspended the execution of judgment (316, 343).

Even though the prosecution sought review, the reviewing court could modify the judgment in favor of the defense (301). If, however, the defendant alone had asked for review, the judgment could never be changed to his disadvantage.[1]

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1. This is the prohibition of so-called, reformatio in pejus.

The court to which the petition for review was forwarded was bound to reject it, if it had not been filed within the proper period. Otherwise, the petition was considered on its merits, although the court of review could reject it if it did not satisfy the requirements of form (322, 346).

3. Appeal (Berufung) This might be either general or particular (318).

In proceedings on appeal, the hearing opened with a review of the earlier proceedings by a member of the court. This included a reading of the first judgment (324). Hearing of witnesses and experts, who had appeared before the lower court, might be dispensed with if their appearance for a second time would not lead to further clarification. New evidence might be offered (323).

If the original judgment was attacked only in part, the hearing on appeal was restricted to the point attacked. If it was attacked as a whole, the case could be completely retried (327). Otherwise, with very few exceptions, the rules prevailing for the original trial were applied.

If the appellate court found the petition justified in whole or in part, as a rule, it gave a new judgment on the substance of the case (328). Otherwise it rejected the appeal.

If the defendant failed to appear for trial on his own appeal, and did not give sufficient excuse for his absence, his petition was rejected. If, however, the appeal had been made by the prosecution, hearing might be held in the accused's absence or else he might be brought before the court (329).

4. Revision Revision was limited to review of points of law (337).

Revision was the method by which judgments rendered on appeal by the small or enlarged criminal section of the Landgericht (district court) could be brought before the appellate court or before the Reichsgericht (Supreme Court). This led to an anamolous situation. In the relatively less important cases originally decided by a single judge of the Amtsgericht (local court) or the small Schoeffengericht, appeal (Berufung) and revision could be had. In contrast, in more serious cases which were first heard by the enlarged criminal section of the Landgericht (district court) or by the Schwurgericht, the judgment could be attacked only by revision (see supra II, A).

The defendant might appear at the hearing on revision, but his presence was not required (350). The court ordinarily examined only those legal points attacked by the party seeking review. However, as questions of law and fact are not easily separated, the reviewing courts had a tendency to examine "mixed questions of law and fact" as well as violations of the "laws of reasoning." This doctrine allowed a rather liberal examination and re-evaluation of evidence, if the reviewing court should so desire.

Two types of judgment were possible. The petition in revision was rejected if there was no violation of law or if the verdict of the trial court did not rest upon the violation of law charged. There were in addition a number of requirements, violation of which led automatically to reversal of the judgment of the lower court (e.g., if the trial court's composition did not correspond to the requirements of law, if the rules governing publicity of the proceedings were violated, or if the defense was improperly restricted by a decision of the trial court on an essential point (338)). If the petition was granted, the judgment of the trial court was reversed in part or totally (354). The reviewing court might be able to decide the substance

of the case, and would do so. If, however, it could not, the case was sent back to the lower court with binding instructions as to the legal principles to be applied (358).

III. CRIMINAL PROCEEDINGS UNDER THE THIRD REICH

A. Introduction

Manifold and decisive changes have been effected by the Nazi Government in the field of criminal procedure. The concept of a certain balance (Waffengleichheit) between the position of the prosecution and that of the defendant (always weaker in German law than in Anglo-Saxon) has been definitely abandoned and, to an ever increasing degree, criminal proceedings have become a one-sided affair, in which the police, the state attorney, and the judge alike had the duty to hunt down and convict the criminal. "Regular" criminal procedure was undermined by the fact that the constitutional guarantees of personal freedom were suspended by the issuance of the emergency decree of 28 February 1933[1] while, without judicial warrant, examination, or trial the police could imprison whomever they wanted. The police not only imprisoned persons without ever bringing them to trial but also acquired the habit of detaining persons acquitted by the court for indefinite periods. The value and importance of criminal proceedings thus disappeared. Judgments lost their character of finality as the police and administrative authorities ceased to be bound by them either in law or in practice.

As the court's authority diminished, so did the state attorney's. Under the Weimar Republic, the police acted as an auxiliary of the state attorney's office (152 G.V.G.). Under the Third Reich the police were

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1. RGBl. 1.83.

completely freed from the state attorney's control. They assumed exclusive charge of the examination of criminal activities and decided whether to hand over a case to the state attorney for the institution of regular criminal proceedings, or whether to apply other more "direct" methods. In initiating criminal proceedings, the state attorney followed closely the suggestions of the police. According to official Nazi authorities, the traditional distribution of functions between state attorney and police was reversed.[1]

At the same time, the direct supervision of the work of the state attorney both by his hierarchial superiors and by the Reich Ministry of Justice[2] was strengthened. In all important cases, and especially in all political cases, reports had to be submitted by the state attorney from the beginning of the case. He had to indicate what steps he suggested and then had to wait two weeks before taking action in order to give his superiors an opportunity to issue direct orders to him.[3]

The destruction of traditional criminal procedure by the Nazis was spread over a period of twelve years. The period from the beginning of the new regime in 1933 to the end of the "peace period" in 1938-1939 was characterized by the rise of all kinds of special tribunals and by an accompanying steady decrease of procedural guarantees. The war legislation beginning in the summer of 1939 accelerated all tendencies to turn criminal proceedings

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1. W. Best, Die Deutsche Polizei (Darmstadt, 1940), p. 28.

2. It should be pointed out that under the Nazi regime the Ministry of Justice took over all functions of the various Laender Ministries of Justice.

3. See the general circular entitled "Reports on Criminal Cases" dated 21 May 1935, a new version of which was printed in Deutsche Justiz 1940, p. 269.

into mere administrative procedure until, at the very end of the winter 1944-1945, any resemblance to regular criminal procedure ceased to exist.

B. The Rise of Special Courts

In pursuance of Article 16 G.V.G. and Article 105 of the Weimar Constitution, special or emergency courts (Ausnahmegerichte) withdrawing an accused from access to the court constitutionally appointed for him had been forbidden in principle, although the rule had not always been followed under the Republic. But under the Third Reich special criminal courts, which during the Weimar Republic were rare and controversial exceptions, became the norm. The impact of the institution of special courts on criminal proceedings was far-reaching, chiefly because it introduced procedural innovations changing the general rules of criminal procedure to the disadvantage of the defendant.

The special courts established by the Third Reich were courts either for certain categories of persons or for certain special categories of cases.

1. Special Courts for Certain Categories of Persons Military courts, abolished by the Weimar Constitution except for personnel aboard warships, were reestablished by the law of 12 May 1933.[1] At the same time special rules for court martial were re-introduced.[2]

a. Party Members There were, relatively early in the first period, informal proceedings before the Party tribunals, which extended to all acts by party members prejudicial to the Party's good name. If both persons

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1. RGBl., 1, 264.

2. See German Military Government over Europe: Military and Police Tribunals in Occupied Europe, R & A 2500.18.

involved belonged to the Nazi Party, these courts could take exclusive jurisdiction of all cases which normally would have been brought before a criminal court by a private person.

Somewhat more formalized were the rules issued in 1939[1] and 1940[2] on the special jurisdiction in criminal cases involving members of the SS. In order to avoid the need of having party actions come under review by army courts-martial, these decrees confirmed the long standing de facto exception from the jurisdiction of the regular law courts. A system of special courts was created for the professional members of the Reichsführung SS, the SS troops for special tasks, the SS Death Head formations, the Junker schools, and the police forces for special operations. The jurisdiction of this system of SS courts, crowned by a kind of supreme court in the Hauptamt SS Tribunal, replaced that of the regular courts as well as courts-martial not only for proceedings against members of those formations, but also for proceedings against persons brought before the court for attacks on members of the SS and police forces.

The rule for proceedings before these courts, while generally following the rules for court-martial proceedings, gave all power to the president of the court. The other judges acted only as "his advisors." He had full discretion in regard to the admission or rejection of evidence (compare II, D, 2).

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1. Decree of 17 October 1939 on special jurisdiction in cases concerning members of the SS..., RGBl. 1, 2107. See also the executive decree of 1 November 1939, RGBl. 1, 2293.

2. Second executive decree of 17 April 1940, RGBl. 1, 659.

b. Reich Labor Service Members of the Reich Labor Service were also subject to a special criminal jurisdiction. After 1936, the special disciplinary sections (Dienststrafkammer) of the labor service usurped an increasing degree of jurisdiction in disciplinary and criminal matters for petty offenses as well as for a great number of misdemeanors.[1] They handed down sentences of imprisonment (Zellenarrest) up to one year.

Decisions of the disciplinary sections were subject to the review by the hierarchical superior of the accused. This superior could, however, decide the case himself without recourse to the services of the disciplinary section, if the matter seemed less important.

Hearing of the defendant and of witnesses was recommended to the section, but it was not mandatory (compare proceedings in pre-Nazi law, II, D, 1).

c. Jews A decree of 1943 legalized the practice which excluded Jews from access to any law courts.[2] Offenses committed by Jews were dealt with exclusively by the police.

2. Special Courts for Certain Categories of Cases Special Courts were opened immediately after the Reichstag fire in 1933.[3] Originally their jurisdiction was restricted to a number of political offenses enumerated in the 1933 decree. Their jurisdiction, however, was steadily enlarged so that

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1. See executive order of the Ministry of Justice of 6 May 1936, Deutsche Justiz, p. 709, and the decree on the changes of disciplinary rules for the labor service of 24 April 1942, RGBl. I, 242.

2. Decree on the punishment of Jewish offenders by police measures of 1 July 1943, RGBl. I, 372.

3. Decree on the opening of special courts of 21 March 1933, RGBl. I, 136.

by 1938 the state attorney was authorized to bring any case before the special court which he thought fit, either because of the gravity of the offense, the popular excitement which might have been aroused by the offense, or the inherent danger to the public order.[1]

3. Effect of Establishment of These Two Court Systems Even before the war, the special court had largely replaced the original jurisdiction of the Schwurgericht and that of the criminal section of the Landgericht (district court) (compare II, A). The special courts which sat at the seats of the major Landgerichte comprised three professional judges, omitting the lay assessors previously used in the Landgericht. Neither judicial instruction nor judicial order to hold a defendant for trial were resorted to in proceedings before special courts (compare II, C, 3-4). The president of the court set the date for trial after he had received the act of accusation from the state attorney. The court decided freely on the scope of evidence to be heard. Up to 1939, the decision of the court was final and could not be changed, although a petition for retrial was at least theoretically admissible (compare II, I). No retrial seems ever to have taken place.

4. The People's Court The People's Court was set up in 1934.[2] It took over the jurisdiction in treason cases, as the Reichsgericht (Supreme Court) after the Reichstag fire was not believed to be fully reliable. Its jurisdiction was increased by the expanded concept of treason as well as by the

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1. Decree on the enlarged jurisdiction of special courts... of 20 November 1938, RGBl. 1, 1632, and the decree on jurisdiction of criminal courts, special courts, and other procedural measures of 21 February 1940, RGBl. 1, 405.

2. Statute of 24 April 1934 and the executive decree of 29 June 1934, RGBl. I, 341, 612. See also the statute of 18 April 1936, RGBl. I, 369.

addition of new fields of activity, especially in regard to damage to material required for national defense, sabotage, and acts undermining the will to resist of the German people.[1] At the end of the Third Reich, its jurisdiction had been increased to such a degree that it was virtually all-embracing.

The People's Court sat with five members. Two were professional judges; the other three were appointed from the SS and Party ranks, either because they had special knowledge of defense measures against subversive activities, or because they were intimately connected with the political trends of the nation.

A judicial investigation was permissive, not mandatory (compare II, C, 3). There was no judicial order to hold defendant for trial (compare II, C, 4). Defendant's choice of counsel required the approval of the court (compare II, C, 5). In other respects, the rules concerning trials arising under the original jurisdiction of the Reichsgericht (Supreme Court) were followed. The decision of the court was final.

There was a special Reich attorney at the People's Court, who was also authorized to bring less important cases before the criminal division of the appeal court.

C. Procedural Changes between 1933 and the Outbreak of the War

In addition to the creation and use of new special courts, the Nazi regime effected certain changes within criminal procedure itself.

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1. Decree of 21 February 1940, RGBl, I, 405 and the decree of 10 December 1941, RGBl. I, 776.

1. Swearing of Witnesses One of the very few beneficial measures taken by Nazi legislation in the field of criminal proceedings was the statute which restricted examination of witnesses under oath. Prior to 1933, perjury cases necessitating trial before the Schwurgericht were frequent. The requirement that every witness was to be sworn in before examination, irrespective of the importance of the case, led to frequent perjury trials, especially in alimony proceedings. The new statute[1] ordered the oath to be taken after the witness had given testimony, thus giving him a chance to correct false statements (59 n.v.).[2] In addition, it greatly enhanced the trial court's discretion as to the use of the oath. The court could dispense with swearing the witnesses, whose testimony was without importance or obviously false in the opinion of all members of the trial court. It might also dispense with the swearing of persons, when both the prosecution and the defense agreed to waive it (61, 5-6 n.v.).

The trial court's discretion in this connection was even greater in regard to prosecutions for petty offenses and cases brought before it by private prosecutors (62 n.v.).

2. Warrants The position of the defendant detained under a preliminary warrant deteriorated. Oral hearing on the validity and necessity of the warrant was abolished in 1934.[3] The courts were merely directed to watch over the lawfulness and necessity of continued detention (115 n.v.) (compare II, C, 2).

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1. Statute on the restricted use of the oath in criminal cases of 24 November 1943, RGBl. I, 1008.
2. Articles 57 and 59 of the code of criminal procedure were rephrased by the decree of 29 May 1943, RGBl. I, 341. Unsworn untrue statements were made subject to punishment. However, no change in procedure resulted. See also the decree of 28 January 1944, RGBl. I, 41.
3. Statute on changes in substantive and procedural criminal law of 24 April 1934, RGBl. I, 311.

The law of 28 June 1935,[1] which contained some major changes in criminal procedure, added some new and rather vague conditions under which a warrant might be issued. A preliminary warrant could be issued if it was feared that the offender would commit further offenses or if the gravity of the offense or the public excitement caused thereby was such that his remaining free was "intolerable" (112 n.v.) (compare II, C, 2).

3. Blackmail Amendments made by this same 1935 law made the prosecution of offenders who had been blackmailed subject to the state attorney's discretion (154 n.v.).

4. Duty to Testify: Officials The scope of the trial court's possible inquiries and its opportunity to render a just judgment in all matters touching even slightly upon the affairs of the Nazi Party was considerably narrowed by the conditions which were imposed on the appearance as witnesses of functionaries and members of the Nazi Party. No Party sub-leader or member of the SS or of the Party court could be called to give evidence on subjects in regard to which he was bound to maintain silence, in the absence of express Party permission. Even the ordinary members of the Party had to have Party permission to appear as witnesses on subjects and materials which had been classified as confidential[2] (compare II, D, 3).

5. Trial in Absentia Reversing the former practice, proceedings in absentia were freely allowed (compare II, D, 3). The state attorney was permitted to proceed against "fugitives from justice" who had left the country

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1. Statute on changes in criminal procedure and in the court organization of 28 June 1935, RGBl. I, 844.

2. Statute on the examination of members of the NSDAP before the courts of 1 December 1936, RGBl. I, 994.

or gone into hiding. Such prosecutions could be instituted if the famous "people's sense of justice" so required, unless the early return or extradition of the fugitive could be expected, or unless the sentence could not be enforced. Service by publication was permitted and, at the same time, the court could order attachment of property belonging to the defendant. Counsel was appointed ex officio. If conclusive evidence was not produced, the prosecution was provisionally dismissed. Sentence expressly designated as "sentence against an absentee" was served by publication and execution attempted. If the fugitive returned later, the case had to be re-opened again if within a week he applied for a new trial. This might be granted if he could excuse his absence or if other circumstances made a new trial advisable (276-282 b, n.v.).

There was a set of special rules for proceedings against fugitives from army service (434-441 n.v.).

6. Appeals The statute of 28 June 1935 did away with the defendant's right to have judgment changed in his favor only if the state attorney did not join in the petition for review. Any appeal could be changed to the disadvantage of the defendant (331, 358, 373 n.v.).

7. Changes Made to Harmonize Procedure with Substantive Law Other changes made in 1935 brought criminal procedure into harmony with the corresponding changes in the criminal code. The law against dangerous habitual criminals, which gave the courts authority to order far-reaching measures of security, required a great number of changes in the code of criminal procedure to provide for special proceedings and the institution of a number of procedural guarantees to be observed in these procedures. These changes were

contained in a law implementing the statute against dangerous habitual criminals which had been enacted 24 November 1933.[1]

State attorneys and courts alike were directed to examine each case to determine whether the application of criminal law by analogy might be required (178, 267a, 347 n.v.). Since Article 26 of the criminal code permitted finding the defendant guilty of the alternative violation of a criminal provision (e.g., larceny or receiving), the trial court was directed to pronounce the defendant guilty only of the milder of the two provisions, which he might alternatively have violated (267 n.v.).

Other new provisions brought the ordinary criminal procedure somewhat into line with the rules established for the special proceedings already described. Judicial investigation was no longer mandatory but depended in each case on a request from the state attorney (178 n.v.) (compare II, C, 3). The examining judge could get help from auxiliary judges appointed by the president of the Landgericht (184 n.v.)

The power of the courts to reject evidence was somewhat enlarged, though not to the extent prevailing in proceedings before special courts (244 n.v.) (compare II, D, 3).

D. The War Legislation

1. 1939-1942 The first years of Nazi reforms in the administration of criminal law were full of haphazard innovations designed to facilitate the work of the repressive machinery. The coming of the war acted as an incentive to destroy the differences which still existed between various

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1. RGBl. I, 1000.

proceedings before special courts and those of the regular law courts, to unify the policy of repression and to oust unreliable as well as unnecessary personnel.

Legislation issued immediately prior to the outbreak of war[1] and later in February 1940[2] remodeled criminal jurisdiction and criminal appeals completely. In the first place, it entirely abolished the participation by lay elements in the administration of criminal justice, with the exception of the so-called lay assessors in the People's Court. The lay assessors of the Schoeffengericht, the Schwurgericht, and the Jugendgericht (see II, A and H, 2) disappeared.

With this measure, the first two courts were abolished. The original criminal jurisdiction of the regular courts, which were supplanted more and more by the expanding jurisdiction of the special courts (see III, B) was divided between the single judge of the Amtsgericht (local court) and the three professional judges of the criminal section of the Landgericht (district court). The single judge of the Amtsgericht was given jurisdiction to impose sentences up to two years at hard labor or up to five years in prison. He could order certain measures of security, but these could not include security detention or castration. The penal power of the criminal section of the Landgericht was made unlimited.

The innovations of this period strengthened the position of the state attorney in some respects, because the selection of the court to try the

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1. Decree concerning measures in the field of the administration of justice, of 1 December 1939, RGBl. I, 1658 and the statute on changes in criminal procedure, court martial procedure and criminal law of 16 September 1939, RGBl. I, 1841.

2. Decree on jurisdiction of criminal courts, special courts ... of 21 February 1940, RGBl. 1, 405.

case was made dependant not upon the frame of punishment provided in the criminal code, but upon a decision by the state attorney. If he considered that the defendant should be sentenced to no more than two years' at hard labor or five years in prison, he brought the case before the Amtsgericht (local court). Otherwise he asked for trial before the Landgericht (district court). The single judge of the Amtsgericht (local court) could, however, object if he felt that a higher punishment was probable and transfer the case to the Landgericht (district court). At the same time, the state attorney was given the right to send important cases not arising under the jurisdiction of the special courts directly to the Reichsgericht (Supreme Court) (compare II, B and III, A).

The cases in which appointment of defense counsel was necessary were restricted. In those cases in which neither death, life punishment, security detention, nor castration were threatened by law, or in which no case of perjury, second degree murder, commitments of a deaf, dumb, or insane person, or extradition were involved, appointment of defense counsel was made only if requested by the state attorney (compare II, C, 5).

The rules governing hearing and rejection of evidence were completely adapted to the proceedings before the special courts (compare III, B). The trial court could reject any evidence held unnecessary in its official search for truth.

On request by the state attorney, abbreviated proceedings could be initiated in all cases coming before the single judge of the Amtsgericht (local court). The accusation had to be formulated only at the beginning of the trial. The defendant had to be summoned only twenty-four hours before his

trial and then only if he did not appear voluntarily or was not produced in court by the state attorney (compare II, C, 1-2, and 4).

Written penal orders could impose sentences up to six months (compare II, H, 2).

Appeals were restricted to either appeal (Berufung) or revision. The judgment of a single judge of the Amtsgericht (local court) could be completely revised by the criminal section of the Landgericht (district court) on appeal (Berufung). While the judgments reviewed on appeal by the Landgericht (district court) were final, its judgments in cases arising under its original jurisdiction were subject to review by the Reichsgericht (Supreme Court), if a violation of a legal requirement was claimed by means of a petition of revision. Decisions on applications for retrial could be indefinitely postponed. (Compare II, I)

Before the war Nazi courts, and especially the administrative authorities, had begun to view with disfavor the strict rules governing the finality of judgments and an early attempt had been made to whittle down the protection which this finality gave the accused against new prosecutions based on the same set of facts.[1] The problem became urgent when the outbreak of the war brought a rapid expansion of the activities of the special courts. As their judgments were final, acquittals or mild sentences handed down by recalcitrant judges could not, at least legally, be superseded (compare II, F, 3, a-b).

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1. Compare Schwarz, Strafprozessordnung (8th ed., 1940), Art. 264 n. 3.

Two remedies were set up under new legislation. First, the Reich Attorney could, within a year after judgment became final, petition the Reichsgericht (Supreme Court) for nullification (Nichtigkeitsbeschwerde) of the judgment of a single judge of the Amtsgericht (local court), of the criminal section of the Landgericht (district court), or of the special court. The petition for nullification could be had if "the unjust decision followed from the faulty application of legal principles on a set of ascertained facts."[1] The Reichsgericht (Supreme Court) was authorized either to render a new judgment or to send the case back to the lower court, with binding instructions as to the legal principles which should govern the new judgment (compare II, I).

While the nullification device had some semblance to legal institutions of other countries, the second device was avowedly political. Instead of bringing the case within one year before a regular division of the Reichsgericht (Supreme Court), the Reich Attorney as special representative of the Führer could send it to a special division of the Reichsgericht (Supreme Court) by way of an "extraordinary remedy" (Ausserordentlicher Einspruch). He was not bound to find any legal fault with the judgment. It was enough that he had "grave misgivings as to its correctness."[2] The case was then tried de novo. The division which held this trial was, however, one whose members were handpicked by the Reich Ministry of Justice and was not a free agent in deciding the case.

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1. Decree of 21 February 1940, para. 34.

2. Decree of 16 September 1939, Part I, Article 2, para. 3.

When resorting to this extraordinary remedy, the Reich Attorney as representative of the Führer could lay down binding directives for the decision of the case.[1]

2. 1942-1945 Though sweeping and depriving the defendant of many important guarantees, the reforms of 1939 and 1940 had left, nevertheless, some semblance of an adversary procedure. Theoretically, a conscientous court not afraid to incur the disfavor of the Party and the administration might still try to give the accused a fair trial, even if it were powerless to hinder a new political trial before the special division of the Reichsgericht (Supreme Court). The decrees following in the wake of the Führer edict of March 1942[2] swept away the remnants of orderly procedure. Partly because of an apparent opposition move among the judiciary,[3] but partly also because of the growing shortage of personnel, the stream-lined procedure took on more and more the aspect of non-contradictory administrative decision. The order to hold a defendant for trial, increasingly curtailed in application, was completely abolished[4] (198, 199 n.v.) (compare II, C, 3 and III, B, 3).

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1. Tegtmeyer, "Der Ausserordentliche Einspruch," in Juristische Wochenschrift 1939, p. 2060.

2. Führer edict on simplication of administration of justice, 21 March 1942, RGBl. 1, 139.

3. See the decision of the Grossdeutsche Reichstag, 26 April 1942, RGBl. 1, 241, where the right of the Leader to remove every judge who does not contribute his share to victory was stressed, without regard to existing legal guarantees.

4. The details were governed by a special decree on the abolition of this order of 13 August 1942, RGBl. 1, 512, implementing the decree of the same date, RGBl. 1, 508, on further economies in the administration of justice. This last was based on the Führer edict of 21 March 1942.

The state attorney could institute a complaint, if the court refused to set a date for trial, because it lacked jurisdiction or because acquittal seemed predictable (203, 204 n.v.) (compare II, C, 3).

No representative of the state attorney was required to attend the trial before the single judge of the Amtsgericht (local court). This judge was authorized to impose sentences up to five years' hard labor and could also issue penal orders sentencing up to six months' imprisonment (compare II, A and H, 1).

Provision for cross-examination of witnesses and experts was explicitly stricken from the code (239 n.v.) (compare II, D, 3). Adjournment for a period up to thirty days was permitted (229 n.v.). While the trial was pending, the state attorney could amend the act of accusation to include a new set of facts, if the accused were present and the jurisdiction of the court was established (266 n.v.).

Any kind of complaint and appeal was allowed only if the court permitted (compare II, I). For this reason, the trial court was not required to elaborate the reasons for its judgment (compare II, F, 1). If there were no legal remedy against the judgment, it was enough for the trial court to state the facts, to refer to the law which had been applied, and to give some reasons for the sentence.

If, however, the defendant was left without remedy, the right of the Reich Attorney to attack the final judgment by means of the nullification procedure introduced in 1940 was again enlarged. It was extended to questions of fact as well as to questions of law and also to the adequacy of the punishment. The new regulation thus provided the state, but not the accused, with an unlimited right to ask for a review of the judgment within

one year after the decision had been rendered.[1] While such procedure might prolong the period of detention pending trial, the rules governing such periods of detention were changed to the disadvantage of the prisoner. Periods of detention pending trial were increasingly assimilated to regular prison terms. Among other things, the duty to work, long since introduced in practice, was legalized (116 n.v.) (compare II, C, 4). As early as 1940, a special decree had ordered that sentences of hard labor begin to run only with the end of the war, thus increasing the length of the punishment automatically by the duration of the war.[2]

The opportunity for a private citizen to institute prosecution for defamation was severely curtailed. Such a case could normally be brought before the court only after a cooling-off period of one month; adjournment was also possible. In minor cases, defamation trials could end with a "peace edict" (Friedensspruch), warning the offender and/or imposing a fine with the additional possibility of binding over the offender to keep the peace for a maximum of two years. Furthermore, after 1943, the injured person or his heir could ask damages computed on a civil law basis in the criminal trial instead of a mere penalty (Busse), if the claim was not yet pending before another court (403-406, 412 n.v.)[3] (compare II, E).

The May 1943 decrees also denied the accused the right to force a court decision on his petition for the removal of a biased judge. The

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1. Decree of 13 August 1942, Para. 17, 4, RGBl. I, 508.

2. Decree on the execution and punishment of offenses committed during the war, 11 June 1940, RGBl. 1, 877.

3. Third decree on changes in the administration of criminal law, 29 May 1943, RGBl. 1, 342 and the decree on further economies in the administration of criminal law, 29 May 1943, RGBl. I, 346.

petition for removal had now to be directed to the hierarchical superior of the judge (27-30 n.v.). At that time the act of accusation had to describe the essential outcome of the investigation only if such description was necessary for the preparation of the trial (217 n.v.). After 1943 the president of the trial court could delegate to his lay assessors his authority to decide alone on simple cases and could also have the court render decisions with two instead of three members sitting (compare II, D, 2). The possibility of dispensing with the services of a recorder, which had been permitted in 1942 for the trial stage, was extended to all other judicial action.

The number of cases in which the reading of an earlier judicial deposition of a witness could be used in lieu of his testimony was considerably increased. Moreover, documents and reports, as well as records of non-judicial interrogation could generally be introduced in evidence, if they were not to be utilized for the ultimate basis of judgment, but merely for preliminary decisions (251 n.v.) (compare II, D, 1 and 3).

In 1943, the authorities seemed to have felt the necessity of being able to retry the defendant, not only before the Reichsgericht (Supreme Court) but also before the court which had original jurisdiction of the case. Therefore, the strict rules governing retrial after final judgment were changed so as to allow retrial, in cases where a new trial might result in the conviction of an acquitted person or in the imposition of a harsher sentence (359 n.v.) (compare II, F, 3, a and I). The assurance that such proceedings "will only be initiated if the new prosecution is necessary for the protection of the people" only stressed the fact that the judgment of

German criminal courts had lost every character of finality. This result was especially serious in view of the fact that the retrial was not under any time limitation, as were the nullification and extraordinary proceedings before the Reichsgericht (Supreme Court).

A 1944 decree made some revealing changes in regard to the fees of lawyers in criminal cases. Until then these fees were a matter of private agreement between defendant and counsel, but now a scale has been fixed by law. This scale varies according to the court and the length of trial. It might be exceeded only in cases of "extraordinary size" on special permission granted by the Reich Ministry of Justice[1] (compare II, C, 5). It may be assumed that this measure became a necessity when services of counsel were retained more with a view to his connections with the authorities than with regard to his professional qualifications. These last seemed to have become comparatively irrelevant.

In December 1944 and January 1945, when the Nazi regime was already in extremis, a number of additional measures seem to have been issued. The trial court was given absolute discretion as to whether an ex officio defense counsel should be appointed (compare II, C, 5). The state attorney seems to have been empowered to issue warrants of arrest on his own, valid for three weeks, after which period a court decision had to be sought, if its further maintenance was requested.[2] But it may be questioned to what extent these last measures had any importance. Early in 1945 criminal courts, with the exception of the People's

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1. Decree on changes in counsels' fees, 21 April 1944, RGBl. I, 104.
2. Deutsche nachrichten buro, 20 January 1945.

Court and some special courts, seem to have been completely superseded by hastily established special summary courts. These courts, convoked by the Gauleiter, were composed of SS and Party functionaries. They were established in all territories endangered by the enemy. Judgment in these courts was either acquittal, death sentence or, theoretically at least, transfer of the case to the regular courts.

E. Proceedings against Juvenile Offenders under the Third Reich

As rules for the administration of criminal justice against juvenile offenders were codified in November 1943, and as this action specifically abrogated former enactments, it is unnecessary to dwell on the various changes which were previously introduced.[1] The new law abolished the enlarged juvenile court and gave the juvenile judge sitting without lay assessors the right to sentence to prison terms (compare II, H, 2). However, the full juvenile court had to be convoked (20, 26 J.G.G.n.v.) if the punishment was not taken from the range of punishment provided by this law but rather from the wider range of the general criminal law including the dealth panalty, as was permissible in cases of so-called serious juvenile criminals and others after 1939. Nor was there any longer a possibility of bringing offenders in the 18 to 21 age group before the juvenile court. The state attorney could, moreover, bring a juvenile offender before the People's Court or the special courts (76 J.G.G.n.v.).

This major destruction of the scope and function of the juvenile court was accompanied by a number of other changes of varying degress of importance. The state attorney could ask for simplified procedure, if only

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1. Reichsjugendgerichtsgesetz, 10 November 1943, RGBl. I, 637.

educational measures were to be taken (48 J.G.G.n.v.). The Hitler Youth had been given the same prerogatives in the proceedings as the Youth Aid Organization (25, 35, J.G.G.n.v.). No written penal order was admissible against a juvenile offender (51 J.G.G.n.v.). If exclusively educational measures were fixed in the judgment, it could be appealed only by the accused if it provided for commitment to a reformatory (40 J.G.G.n.v.). Although prison sentences were recorded in the criminal register (Strafregister), the intervals after which only public authorities had access to such information and the interval after which the sentences were finally extinguished were shortened in comparison to the treatment of sentences against adults (69, 70 J.G.G.n.v.).

In addition, the law provided a special procedure for the re-integration of juvenile offenders into the community. Two years after the expiration of the sentence, an offender considered worthy could, with the consent of the Party and the juvenile authorities, be solemnly received into the community under a decision of the juvenile court. He could thereafter deny the existence of any previous conviction. The decision was, however, not irrevocable and, in case of "indignity," could be revoked by the court (71-75 J.G.G.n.v.).[1]

F. Amnesties and Individual Acts of Mercy under the Third Reich

In sharp contrast to the practices prevailing under the Weimar Republic, the Third Reich issued a great number of amnesties. Such general

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1. It is doubtful to what extent this law ever went into effect. See Review of the Foreign Press Series A, Memorandum No. 312, 24 April 1925.

amnesties were issued in 1933,[1] 1934,[2] 1936,[3] 1938,[4] and in 1939 at the beginning of the war.[5] They were accompanied by a number of special amnesties for the population of newly annexed territories and by various amnesties for breaches of discipline in a great number of professions. The general amnesties covered the following offenses:

a. Minor offenses of all types covering between one to six months' imprisonment and fines;

b. Minor offenses of political enemies of the regime, covering defamation and similar cases, or, more generally, prison terms up to six months;

c. All types of offenses and sentences of "over-zealous" political adherents of the new regime. Most of the amnesties did not cover wilful murder; but those of 1933 and 1938 did. The latter, however, referred only to acts relating to Austria's "freedom fight."

The importance of these amnesties lies in the fact that they included not only final sentences and pending trials, but also cases involving offenses still under investigation by the state attorney and the police, and those which had not yet come to the attention of the authorities. If the offenses in question occurred before the effective date of the amnesty, they were covered by it.[6]

Individual acts of mercy were issued as a rule -- except in a few cases explicity reserved to the decision of the Führer -- by the Reich

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1. Presidential amnesty decree of 21 March 1933, RGBl. I, 134.
2. Amnesty law of 7 August 1934, RGBl. I, 769.
3. Amnesty law of 23 April 1936, RGBl. I, 378.
4. Amnesty law of 30 April 1938, RGBl. I, 433.
5. Führer edict on amnesty of 9 September 1939, RGBl. I, 1753.
6. As regards the numerical importance of these amnesties, see Civil Affairs Handbook, Germany: Section 3: Legal Affairs, p. 58.

Ministry of Justice. The examination of the cases, however, was concentrated completely in the hands of the various state attorneys, who might, in most cases, reject the petition without any need to report it to their superiors.[1]

1. Decree of the Reich Ministry of Justice on proceedings on clemency petitions of 6 February 1935, Deutsche Justiz 1935, p. 203.